

## TUNISIA'S NEW CONSTITUTION: THE BENCHMARK OF TRANSITIONAL SUCCESS FOR POST- REVOLUTIONARY AFRICAN STATES

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### I. INTRODUCTION

*“Any people anywhere, being inclined and having the power, have the right to rise up, and shake off the existing government, and form a new one that suits them better. This is a most ... sacred right ...”<sup>1</sup>*

President Abraham Lincoln's words now over a century old have certainly challenged and defeated time yet since the so called 'Arab Spring Revolutions' broke out in the Middle East in 2011, there have been fears of state failure especially considering the current ceaseless unrest in Cairo, Egypt.<sup>2</sup> The revolutions began on 17<sup>th</sup> December 2010 due to the martyrdom of a 26 year old vegetable vendor, Mohamed Bouazizi who set himself on fire in rural Sidi Bouzid, Tunisia after having been slapped by a municipal officer and his goods confiscated.<sup>3</sup> A rebellion led to the exile of President Zine El Abedine Ben Ali and ended his 24 year authoritarian regime on 14 January 2011.<sup>4</sup> Amongst the nine African states that have embarked on constitutional reforms, Tunisia is the first Arab state to adopt a new constitution. (Kenya and Zimbabwe have recently adopted their constitutions, whilst Zambia, Tanzania, Somalia, Liberia, Egypt and South Sudan are still in the drafting process.) Positive reforms are evident and welcome as Tunisia's internal stability is crucial for the stability of the region at large.

Africa has been independent for the last fifty six years; yet that transition into fulfilling self rule left the electorate disillusioned. Almost all fifty four emerging states save for Liberia and Ethiopia, have a colonial background that they struggle to emerge from.<sup>5</sup> Independence however, failed to change the social, political and economic forms of colonial oppression hence the rebellions that have triggered contemporary constitutional reforms. The constitution is not the entire solution to political reform but it is an important step. Even for successful democracies like South Africa which is commemorating twenty years of constitutional democracy since the end of apartheid in

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<sup>1</sup> Abraham Lincoln, 12 January 1848, while delivering his speech against the Mexican war.

<sup>2</sup> For a summary of the entire revolution see *The timeline of African and Middle East Rebellions*, THE TELEGRAPH, Oct, 21, 2011, available at: <http://www.telegraph.co.uk/news/worldnews/africaandineanocean/libya/8839143/arab-spring-timeline-of-the-African-and-Middle-East-rebellions>

<sup>3</sup> Elizabeth Day, *The Slap that Sparked a Revolution*, THE GUARDIAN: THE OBSERVER, May 15 2011, <http://www.theguardian.com/world/2011/may/15/arab-spring-the-slap>.

<sup>4</sup> *Ibid.*

<sup>5</sup> These two are the only African states that have never been colonised.

1994, satisfactory implementation continues to be a challenge especially in favour of the previously disadvantaged black majority.

Despite the standards underpinning democracy and the universality of constitutional rights, constitutions are made from history to address past wrongs, attempting to rewrite fate in a seemingly 'timeless' document.<sup>6</sup> This is a bridge through which the citizen should safely cross to the 'Promised Land'.<sup>7</sup> The begging question from the Tunisian experience is; how does a constitution created within a revolutionary environment effectively fulfil the wishes of the citizens and secure their future? Africa Law Today celebrates with the Tunisian Republic and hopes to provide a brief evaluation of the constitutional reforms. The scope of this article will therefore be limited to a basic analysis of the Tunisian transitional process, and merits of the 2014 Constitution in light of contemporary trends. Egypt's draft will be compared as a 'revolutionary comrade' whilst Zimbabwe's long constitutional experience provides useful insight. I hope to unearth the necessary ingredients for effective post-revolutionary constitutional order for current African states in transition.

## II. CONTEMPORARY TRENDS OF CONSTITUTIONAL REFORMS IN AFRICA

### *A. The Challenges of Constitution-Making within a Revolutionary Environment*

As the supreme law of the land, the constitution stands to create rights that are exercisable against the state as sole guardian of the bill of rights. It is a sacred right of every citizen.<sup>8</sup> A constitution ought to be the foundational legal basis for all state reforms or policies. It should be a 'social insurance', with which a state can provide guarantees to provide institutions for the realisation of fundamental rights.<sup>9</sup> The ideal constitution-making that supports the current trend of reforms is probably one that embodies two aspects; 'transformative constitutionalism' and 'participatory/inclusive/popular Constitutionalism'.<sup>10</sup> The former produces a constitution that has long term egalitarian and poverty eradicating reforms like the South African one. The latter is the 'people driven' constitution created directly by informed and empowered citizens as what has been attempted in South Africa, Eritrea, Uganda and recently, Zimbabwe and unlike the US Constitution of 1789.<sup>11</sup>

Though constitution-making is indispensable for change it has proven vulnerable to manipulation and corruption, such that 'the just process for a just outcome', may fail to materialise. As Howard Zinn notes:

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<sup>6</sup> Marshal N. Mapondera, *The hope of 'constitutionalising' economic empowerment of Zimbabwean women in the post 2013 era*, in WOMEN AND CONSTITUTION-MAKING IN AFRICA, (African Network of Constitutional Lawyers, 2014).

<sup>7</sup> *Ibid.*

<sup>8</sup> Marshal N. Mapondera, *The Sacred Right of a Citizen* (2012), <http://www.kubatana.net>.

<sup>9</sup> The constitution was described by John Locke as a 'social contract' determining rights and obligations between the State and the individual.

<sup>10</sup> See the Viven Hart, *Democratic Constitution-Making*, US Institute of Peace, Special Report 107, 23 July 2003, 7 (2003).

<sup>11</sup> See D Moehler, *Distrusting Democrats: Outcomes of Participatory Constitution Making* 22, (2008).

The Constitution, like the Bible, has some good words. It is also...easily manipulated, distorted, ignored and used to make us feel comfortable and protected. But we risk the loss of our lives and liberties if we depend on a mere document to defend them. A constitution ...is no substitute for the ... concerted action of the citizens.<sup>12</sup>

The revolutionary process may not always respect principles of good constitution-making due to various reasons. Constitutions can emerge and become prominent like the US one, which excluded the majority as well as other groups like African-Americans and women. They can also be inclusive and still fail the electorate.

### ***B. Tunisia's Post-Revolution Rransition: Steps Taken and Lessons Learnt***

- 1) Filling up a political vacuum; interim government (technocrats, former and retired ministers and civil society).<sup>13</sup>
- 2) Creating a political structure for a democratic state; what the new constitution calls '*a participatory, democratic, republic regime*'.<sup>14</sup> The drafting of the new constitution had to be entrusted into the hands of an independent democratic body. The new government therefore created 'The Council of the Higher Authority for the Achievement of the Objectives of the Revolution, Political Reform and Democratic Transition'. This body then tasked a special constituent assembly with the actual drafting process.<sup>15</sup>

The two points listed above show the steps that Tunisia has taken to produce its democratic constitution. Though difficult and laden with a lot of uncertainty due to the general history of the Arab region mostly described by two stereotypes- autocracy and Islamic supremacy, Tunisia has actually defied the odds.<sup>16</sup> It has been suggested that various background factors are responsible for influencing political restructuring in a post-conflict rebuilding process. In Tunisia's case, these are the highly educated people, as well as the long established legal and constitutional culture (Tunisia was the first Arab nation to have a formal written constitution as far back as the nineteenth century).<sup>17</sup>

### ***C. Lessons from the Zimbabwean Revolution***

It is my humble view however, that a transformative constitutional process is dependent on unity, independence and transparency rather than just education and structures. These aspects are merely empowering or capacity related than democracy-related. Zimbabwe provides a good illustration. She has probably one of the most educated people in Africa (certainly ranked as most

<sup>12</sup> Howard Zinn, *A People's Constitution: Some Truths Are Not Self-Evident*, THE NATION, 87-88, (1987).

<sup>13</sup> Michael J. Willis, *Tunisia: the Trailblazer and the Benchmark*, THE ARAB SPRING: IMPLICATIONS FOR BRITISH POLICY, 8, 8-9 (Leo Doherty ed., 2011).

<sup>14</sup> *Ibid.*

<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid*, p.11.

<sup>17</sup> *Ibid*, 9.

literate)<sup>18</sup> and one of the longest constitutional developments to date.<sup>19</sup> Zimbabwe's constitutional history can be traced as far back as 1923, with several constitutions before its independence in 1980 and several drafts that were rejected prior to the current 2013 constitution. Her challenge in attaining democratic constitutionalism before and after independence has always been authoritarian rule and lack of effective structures that facilitated popular constitution making. In 1965 Prime Minister Ian Douglas Smith's colonial regime unilaterally declared independence from Britain and denied both the privileged white minority and the oppressed African majority any participation in the constitutional reforms of the day.<sup>20</sup> The 1979 Lancaster House Constitution that brought independence and led the country for 33 years till its repeal in March 2013, was simply a negotiated settlement for ceasefire between the African nationalists and the colonial government, again the Zimbabwean people had no say.

The 2013 Constitution was managed by an inter-party independent body, the Constitutional Parliamentary Select Committee (COPAC) which delivered a good document but that is yet to be practically implemented for the socio-economic transformation that it was meant to bring. This is mostly attributed to lack of independence, lack of transparency and political will to safeguard democracy by government. The contemporary Zimbabwean constitutional revolution ended up being another negotiated settlement reminiscent of 1979 yet only as a means to end the coalition government under the Global Political Agreement (GPA).<sup>21</sup> President Robert Mugabe himself was quoted as saying:

COPAC should work frantically to produce a report of the (second All-Stakeholders') Conference summarising the views expressed by the stakeholders..., *mindful that our major objectives remain* the holding of harmonised elections in March 2013 under a new constitution.<sup>22</sup>

Having an effective independent body to which the drafters of a constitution can be accountable is imperative. A constitutional court is one such body, and South Africa, provided a global example through its two year process between 1994 and 1996 which also contributed to an unshakeable court till today.<sup>23</sup>

### III. POSITIVE DEVELOPMENTS OF THE NEW TUNISIAN CONSTITUTION

<sup>18</sup> *Ranking of African Countries by Literacy Rate: Zimbabwe Number 1*, THE AFRICAN ECONOMIST (2013), <http://theafricaneconomist.com/ranking-of-african-countries-by-literacy-rate-zimbabwe-no-1/#.ud80DFpxq7ap>.

<sup>19</sup> *See generally*, LAW SOCIETY OF ZIMBABWE, TOWARDS A DEMOCRATIC CONSTITUTION: A RESOURCE BOOK FOR CONSTITUTION MAKING IN ZIMBABWE, 30 (Law Society of Zimbabwe, 1<sup>st</sup> ed. 2010).

<sup>20</sup> *Ibid.*

<sup>21</sup> This was the coalition government of the mainly between ZANU PF, ruling party since independence in 1980 led by Robert Mugabe and the two main opposition leaders, Morgan Tsvangirayi being Prime Minister and leader of MDC-T and Deputy Prime Minister Professor Arthur Mutambara, leader of the breakaway faction MDC-M.. Established 15 September 2008 and ended in July 2013.

<sup>22</sup> *Constitution-Making Process: The Big Lie*, THE DAILY NEWS, 4 November 2012 <http://www.dailynews.co.zw/articles/2012/11/04/constitution-making-process-the-big-lie>

<sup>23</sup> Eric Christiansen, *Transformative Constitutionalism in South Africa: Creative Uses of Constitutional Court Authority to Advance Substantive Justice*, 13 JOURNAL OF GENDER, RACE & JUSTICE, 575, 576 (2010).

I have attempted to provide a snapshot comparative of the two Tunisian constitutions against the Egyptian Draft. I am unable to discuss all the provisions hence I have selected a few. The discussion will provide brief descriptions on reforms to; a) political rights b) Executive authority c) equality d) affirmative action e) socio-economic and developmental rights f) group rights and g) limitations to the bill of rights and constitutional amendment.

*a. Political Rights*

The 1959 Constitution generally had limited rights than the 2014 one. It did provide for freedoms of expression, movement, labour and political representation and protection of the law.<sup>24</sup> The Tunisian Republic has always based its laws on human rights, dignity and religious tolerance.<sup>25</sup> The 2014 Constitution now has wider civil and political rights. This is especially evident in rights related to protection of the law which now spell out presumption of innocence and prisoner's rights.<sup>26</sup>

*b. Executive Authority*

Excessive and unchecked Executive power is clearly one of the reasons for the revolution and constitutional reform. The 1959 Constitution, did not limit the tenure of office/limitations on re-election.<sup>27</sup> The President seemed to enjoy wide administrative powers over both state and government, including key governmental appointments, law making, dissolution of government and amendment of the constitution.<sup>28</sup> Further, the extents authority of the Prime Minister was not quite clear under this constitution as it seems as though it is circumscribed within assistance to the President and leadership of the government though the President could directly deal with cabinet and various government matters.<sup>29</sup>

The New Constitution of Tunisia, has made its intentions to limit excessive presidential powers very explicit. There is now a clear demarcation of mandate between President and Prime Minister. The former being responsible for the state whilst the latter heads government.<sup>30</sup> The Prime Minister's duties are now clearly stated and he or she now has complete control of the government, sets the general policy of the government and has general regulatory powers.<sup>31</sup> The President clearly has more ceremonial roles.<sup>32</sup> Checks and balances are now evident with the requirement of consultation with Parliament whenever the President wants to pass a State of Emergency.<sup>33</sup> Further, it is very encouraging to note that for the first time, the constitution recognises women as equal and able candidates of Presidency against men.<sup>34</sup> The requirement for the presidential candidate to be Islamic is still the only persistent discriminatory provision that does dilute any gains made by an

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<sup>24</sup> Generally Articles 5-17, 1959 Constitution.

<sup>25</sup> Article 5.

<sup>26</sup> Articles 27-30, 2014 Constitution.

<sup>27</sup> Article 51.

<sup>28</sup> Generally Articles 37-57 and Article 76 on Amendment.

<sup>29</sup> Articles 37, 59 and 60.

<sup>30</sup> Articles 71, 91 and 92.

<sup>31</sup> Article 91, 93 and 94.

<sup>32</sup> Articles 77 and 78.

<sup>33</sup> Article 80.

<sup>34</sup> Article 74.



expansion of equality.<sup>35</sup> The New Constitution has also included a limitation of tenure in office to two terms only.<sup>36</sup>

*c. Equality*

The old Tunisian Constitution provided for equality before the law though it does not specify the grounds at all.<sup>37</sup> The fact that Article 38 is specific on the prerequisite of Islam as the religion for a President invalidates that right and this has been maintained in the New Constitution as noted above. The current constitution now mentions gender as one of the grounds for equality, nonetheless.<sup>38</sup>

*d. Affirmative Action*

The 1959 Constitution of Tunisia, surprisingly did not provide much in terms of affirmative action, even in addressing past colonial oppressions and attempts at redress under a new regime. The 2014 Constitution makes the correction, as it attempts to address several wrongs committed under the authoritarian rule of the Ben Ali regime. This is mostly in an indirect language however, unlike such constitutions as Uganda which address marginalised groups<sup>39</sup> or Constitution of Namibia which has an Apartheid and Affirmative Action clause which specifically provides for special consideration of past wrongs to women and need for their empowerment.<sup>40</sup> Youths are now mentioned as ‘an active force of the homeland’.<sup>41</sup> The Constitution mentions their duties but leaves out their benefits. Women are mentioned specifically and separately as deserving ‘protection of their achieved goals’, equal representation and an end to violence against them.<sup>42</sup> Women have now been provided a separate protection of employment rights.<sup>43</sup> There is also implied affirmative action through provision for decentralisation.<sup>44</sup> Probably the best improvement in this regard has been the addition of various commissions to support constitutional reforms meant to empower the previously disempowered such as the Sustainable Development and Rights of Future Generations Commission and the Good Governance and Anti-Corruption Commission.<sup>45</sup> Democracy that they have been created to uphold also means support for economic democratisation which effectively means support for affirmative action programmes.

*e. Socio-economic and Development Rights*

The 2014 Constitution is obviously a welcome improvement in terms of socio-economic rights and development, as the old constitution had very little. Notably, there are now academic reforms which include scientific/technological research and development, health care and

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<sup>35</sup> *Ibid.*

<sup>36</sup> Article 75.

<sup>37</sup> Article 6.

<sup>38</sup> Article 21.

<sup>39</sup> Constitution of the Republic of Uganda, 1995 Article 32.

<sup>40</sup> Constitution of the Republic of Namibia, Article 23 (3).

<sup>41</sup> Article 8.

<sup>42</sup> Article 46.

<sup>43</sup> Article 40.

<sup>44</sup> Articles 14 and 131.

<sup>45</sup> Articles 129 and 130. See Chapter Six: Independent Constitutional Committees generally.

education.<sup>46</sup> Labour rights are more explicit, wider and provided separately from other civil-political rights such as political representation.<sup>47</sup>

*f. Group Rights*

The New Constitution commits to protecting various vulnerable groups namely children, women and the disabled. This is a welcome addition in accordance with the general traditional principles of social tolerance of the Tunisian Republic.<sup>48</sup>

*g. Limitations to the Bill of Rights and Constitutional Amendment*

These provisions clearly left the citizens at the mercy of a powerful government that could easily manipulate the constitution. There was a general limitations clause on all rights on the basis of public order, national defence, economic development and social progress.<sup>49</sup> The President or one third of the Chamber of People's Deputies (Parliament) had authority to amend the constitution.<sup>50</sup>

Limitations under the New Constitution are still imposed generally but subject to judicial checks and limited by human rights values.<sup>51</sup> Amendment of the constitution may now only be *proposed* by the President or by Parliamentary majority, subject to examination by Parliament and only fulfilled by way of public referendum.<sup>52</sup> Further there are provisions that cannot be amended in this constitution dealing with; supremacy of Islam as the national religion, Arabic as the official language and republic as the system of government as well as the one describing the state as a civil state.<sup>53</sup>

The proposed Draft Constitution of Egypt in comparison seems to entrench a staunch Islamist Republic, yet subject to freedoms of worship, thought and opinion.<sup>54</sup> It is quite encouraging to note however that Egypt's proposed reforms are much wider than Tunisia's. These include further protection of private property against expropriation as well as intellectual property rights which may be good for attracting foreign direct investment.<sup>55</sup>

#### **IV. CONCLUSION**

It has been asked at inception; how does a constitution created within a revolutionary environment effectively fulfil the wishes of the citizens and secure their future? Sustainable peace and development is dependent on justice which has to be provided for through unity of purpose. Uniting the electorate to gather their thoughts to address their past, to map a way for an uncertain future is the first step to sustaining that dream for generations to come. That is the most important

<sup>46</sup> Articles 16 as read with 39, as well as 33 and 38.

<sup>47</sup> Articles 35 and 36.

<sup>48</sup> Articles 46, 47 and 48.

<sup>49</sup> Article 7.

<sup>50</sup> Article 76.

<sup>51</sup> Article 49.

<sup>52</sup> Articles 143 and 144.

<sup>53</sup> Articles I and 2.

<sup>54</sup> Comparison is between the Constitution of the Arabic Republic of Egypt, 1971 (as amended in 2007) and the Draft Constitution of the Arabic Republic of Egypt, as updated on 20 September 2012. Articles 8 and 9.

<sup>55</sup> Articles 34 and 36.

function of a constitution in any post-conflict reconstruction phase. Rwanda celebrates 20 years since the horror of the 1994 genocide, yet today she leads all African states in terms of proportional representation in Parliament and has advanced tremendously in empowering her own people. Somalia, carried the heavy label of ‘failed state’ as she had lacked an effective government for the past 22 years,<sup>56</sup> now she is on a sure path of recovery with a constitution underway. As highlighted above, a constitution is not the entire solution but it is the foundation upon which that sustainable future is built as a determinant of the republic’s ideals, government system, fundamental freedoms and means of individual protection.

Tunisia led an entire region’s political transformation through civilian rebellion that has nothing to do with Islam and has further shown the world that indeed united Arabs are capable of creating democratic political systems independently. If she safeguards her principles of equality and tolerance, then long established stereotypes against Arab states of negative/anti-Islamic sentiments can be finally thwarted. She has to make her constitution work as the stability of Middle East and Northern African region is highly dependent on her due to various reasons.<sup>57</sup>

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<sup>56</sup> Last effective government had been President Siad Barre’s who was overthrown by rebel forces in 1991.

<sup>57</sup> Willis *ibid* at 12.